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RECORD AND BRIEFS

No. 07-685

In The

Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

1. This Case Implicates a Constitutional Issue of Great National Importance.

Respondents do not dispute that this case implicates a matter of national significance – namely, the authority of the several States in our constitutional system to investigate possible violations of their criminal laws. Nor do Respondents dispute that the decision below profoundly affects States' ability to exercise that authority. Nor, finally, do Respondents dispute the need for clarity about the scope and contours of that authority.

Instead of directly contesting the significance of this case, Respondents appear to deny that this Court's precedents support any state investigative power over federal employees. In particular, they contend (BIO 7-8 n.2) that this Court's decision in *Maryland v. Soper*, 270 U.S. 36 (1926), "does not suggest, in any way, that the States (or Puerto Rico) may compel federal officials to testify or otherwise produce evidence for purposes of state or local investigations." That statement both mischaracterizes this case and misunderstands *Soper*.

The present proceeding is not an attempt by the Commonwealth to use its own sovereign power directly to "compel" testimony or the production of evidence. Rather, it is an invocation of *the federal courts'* power to direct the production of evidence bearing on possible violations of Puerto Rico law. The Commonwealth readily acknowledges that its suit is

subject to the constraints of federal law, including the Federal Rules of Civil Procedure and Evidence, the federal law of sovereign immunity, and the federal doctrine of "law enforcement privilege" (discussed at greater length in Point 3, *infra*).

Soper confirms that States have a right to evidence of the sort sought here, even when it is held in federal hands. *See Soper*, 270 U.S. at 42 (noting that "[t]he right of the state to inquire into suspected crime in its territory justifies the use of investigation by its officers and the questioning of suspected persons under oath," including in that case the questioning of "federal officer[s] under suspicion"). The *Soper* Court also noted that the federal officers who had provided testimony in that case were not obliged to do so and could instead have "stood mute." *Id.* at 43. But that did not entail a wholesale denial of the State's sovereign authority in this area. Rather, the Court simply recognized that a State's power to investigate possible violations of its laws by federal employees is subject to the same limits that apply to its investigative powers generally, including the constitutional privilege against self-incrimination. Within those limits, *Soper* confirms that States have a "right" to use a variety of investigative methods "to inquire into suspected crime in [their] territory," even when doing so implicates the actions of federal officers. *Id.* at 42. As the Court explained in a later case, *Soper* provides "striking confirmation" that a State retains the power to "administ[er]" and "enforc[e] . . . its criminal law" even in cases "where an important countervailing

federal interest was involved." *Stefanelli v. Minard*, 342 U.S. 117, 120-21 (1951) (citing *State of Maryland v. Soper*, 270 U.S. 9 (1926); *State of Maryland v. Soper*, 270 U.S. 36 (1926); *State of Maryland v. Soper*, 270 U.S. 44 (1926)).

All agree that the States may prosecute federal officers for violating state criminal law. *See* Pet. 15-16 & n.4 (collecting statutes and case law reflecting and acknowledging this point). Yet the power to prosecute cannot be exercised responsibly if States are prevented from thoroughly investigating potential violations of their laws. Certiorari is thus warranted here to clarify the scope of the States' investigative "right[s]." *Soper*, 270 U.S. at 42.

2. Certiorari Is Warranted to Clarify Whether a State's Sovereign Investigative Power Is Subject to the Deferential Standards of the Administrative Procedure Act.

Because resolution of this case requires balancing the Commonwealth's sovereign interest in investigating possible violations of its laws against the Federal Bureau of Investigation's interest in withholding the relevant information and materials, the Commonwealth has sought de novo judicial review of the matter. Resolution of the Commonwealth's suit will ultimately require determining whether the information and materials it seeks are covered by the judicially-created law enforcement privilege. No federal agency has been delegated the authority to

administer that privilege. Thus, deferential "arbitrary and capricious" review under the Administrative Procedure Act (APA) is inappropriate. De novo "nonstatutory" review is in order.

Respondents' answer to this reasoning is to claim (BIO 7) that "[t]he Commonwealth's asserted 'nonstatutory' cause of action . . . simply does not exist." That contention overlooks the settled existence and function of nonstatutory review.

Nonstatutory review has a long and established history as a means of keeping government within the bounds of its lawful authority. It "has produced some of our most important opinions defining the legitimate scope of government action," including *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Peter L. Strauss et al., *Gellhorn and Byse's Administrative Law* 1107 (10th rev. ed. 2003); *see also* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612 (1997).

The dominant view among the lower courts is that nonstatutory review survived the passage of the APA. Most circuits thus treat the APA's waiver of federal sovereign immunity from "action[s] seeking relief other than money damages," 5 U.S.C. § 702, as extending beyond suits brought under the APA itself. *See, e.g., Up State Fed. Credit Union v. Walker*, 198 F.3d 372, 375 (2d Cir. 1999); *Specter v. Garrett*, 995

F.2d 404, 410 (3d Cir. 1993), *rev'd on other grounds*, 511 U.S. 462 (1994); *United States v. City of Detroit*, 329 F.3d 515, 521 (6th Cir. 2003); *Black Hills Inst. of Geological Research v. South Dakota Sch. of Mines & Tech.*, 12 F.3d 737, 740 (8th Cir. 1994); *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998); *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1555 (11th Cir. 1985); *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988).

As explained in the Petition, however (*see* Pet. 21-26), there is disagreement among the circuits about whether suits to compel agency compliance with subpoenas may proceed as nonstatutory actions subject to de novo review. Respondents argue that the split is irrelevant here on the ground that the cases permitting non-APA review involved federal subpoenas governed by the Federal Rules of Civil Procedure. *See* BIO 8 (discussing *Exxon Shipping Co. v. U.S. Dep't of the Interior*, 34 F.3d 774 (9th Cir. 1994), and *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001)). Yet nothing in those cases suggests that their statements about nonstatutory review applied only to those narrow circumstances.

In *Exxon*, the Ninth Circuit "acknowledge[d] that collateral APA proceedings can be costly, time-consuming, inconvenient to litigants, and may 'effectively eviscerate[ ]' any right to the requested testimony." 34 F.3d at 780 n.11 (alteration in original; citation omitted). Those considerations, the court reasoned, provided a "compelling" case for nonstatutory review outside the confines of the APA. *Ibid.* Yet

the time, cost, and inconvenience of APA review do not depend on whether the Federal Rules of Civil Procedure govern the subpoenas in question. *Exxon*'s case against APA review applies with at least as much force here, where such review could undermine the Commonwealth's sovereign authority to administer and enforce its laws.

In *Linder*, the D.C. Circuit stressed that it had "never read the waiver contained in APA § 702 to be limited by [the deferential standard of review set forth in] APA § 706." 251 F.3d at 181. Instead, it applied "the ordinary standard of review to determine whether a district court properly considered the motion to compel production." *Ibid.* Although Federal Rule of Civil Procedure 45 provided the relevant standard in that particular case, the D.C. Circuit did not confine its reading of APA § 702's waiver of sovereign immunity only to such cases. *Linder* thus supports the proposition that a suit, like this one, that relies on APA § 702's waiver is not necessarily subject to APA § 706's deferential standard of review. Respondents' attempts to dismiss *Linder* and *Exxon* as irrelevant to the present case are thus unavailing.

Moreover, any distinction between the above-described cases and this one counsels in favor of de novo nonstatutory review, not against it. *Exxon* and *Linder* involved attempts by private parties to access information relevant to their private litigation efforts. Here, in contrast, the party seeking the information is a sovereign government trying to administer and enforce its criminal laws. The constitutional and

policy arguments favoring de novo review are thus much stronger. Of course, the Commonwealth's right of access to that information is subject to judicially enforced doctrines like the law enforcement privilege. There is no basis, however, for subjecting it to the discretion of a federal agency. Deferring to an agency's nondisclosure decision in a context like this would surely deprive the Commonwealth of any "meaningful and adequate opportunity for judicial review." *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin. Inc.*, 502 U.S. 32, 43 (1991).

3. Certiorari Is Warranted to Clarify the Scope and Application of the Law Enforcement Privilege.

Respondents' claim (BIO 10) that the Commonwealth seeks "unconstrained power to investigate the operations of the federal government" is an extreme and unfounded mischaracterization of the Commonwealth's position. To the contrary, the Commonwealth has filed this proceeding in federal court in recognition of the fact that the federal judiciary has the power to determine whether the Commonwealth shall receive all or any part of the information and materials it seeks. That determination, the Commonwealth further recognizes, is constrained by federal law, including the law enforcement privilege where applicable. This case thus turns in substantial part upon the scope and content of the law enforcement privilege. And as described in the Petition (*see* Pet. 31-34),

that is an issue upon which the lower courts are divided.

Respondents fail to acknowledge the clear split among the lower courts over the scope of the law enforcement privilege. Some federal circuits recognize a broad privilege shielding "documents that would tend to reveal law enforcement investigative techniques or sources." *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 545 (D.C. Cir. 1977). Others, including the Fifth Circuit, extend the privilege beyond the narrow confines of *Roviaro v. United States*, 353 U.S. 53 (1957), only for "information about *ongoing* criminal investigations" by the sovereign asserting the privilege. *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 568 (5th Cir. 2006) (emphasis added); *see also Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991) ("Federal common law recognizes a qualified privilege protecting investigative files in an ongoing criminal investigation."); *Hemstreet v. Duncan*, No. CV-07-732-ST, 2007 WL 4287602 at *3 (D. Or. Dec. 4, 2007) (noting that Judge Posner's opinion for the Seventh Circuit in *Dellwood Farms, Inc. v. Cargill*, 128 F.3d 1122 (1997), recognized a law enforcement privilege for "information held by the government for use in ongoing criminal investigations," and finding the privilege inapposite because the request for information in that case did not involve information relating to an ongoing investigation).

The split among the circuits bears directly on this case, as there is no ongoing federal investigation into the events in question. If the privilege extends

only to materials relating to ongoing criminal investigations by the sovereign asserting the privilege, then Respondents' assertion fails. If it extends further, Respondents may be able to rely on it.

Compounding the uncertainty in this area is the fact that the party seeking the information is a sovereign entity itself, with responsibility for enforcing its own criminal laws. States "are not relegated to the role of mere provinces or political corporations" in our constitutional system. *Alden v. Maine*, 527 U.S. 706, 715 (1999). Respect for their sovereign interests may well require adjusting the federal government's law enforcement privilege in this context. Deep uncertainty thus exists not only about the proper scope of the law enforcement privilege generally, but about its application to cases pitting one sovereign's law enforcement interests against another's.

Respondents appear to deny that the law enforcement privilege should operate any differently when the party seeking the information is a sovereign – unless it is the *federal* sovereign. They stress (BIO 10) that in *United States v. O'Neill*, 619 F.2d 222, 230 (3d Cir. 1980), the court saw "an anomaly in the assertion of a public interest 'privilege' *by the City* to justify withholding information *from a federal Commission* charged by Congress to investigate [certain matters] in the public interest." (Emphasis added by Respondents). It is true that the particular assertion of privilege at issue in *O'Neill* was by a local government against a federal entity. And, of course, constitutional principles of federal supremacy do not treat

federal and non-federal sovereigns equally for all purposes. *Cf.* U.S. Const. Art. VI. But it does not upset those principles to recognize that *O'Neill*'s observation applies just as well in cases where the party holding the information is a federal agency and the party seeking it is a State (or Puerto Rico). *Cf. Resolution Trust Corp. v. Diamond*, 773 F. Supp. 597, 605 (S.D.N.Y. 1991) (citing *O'Neill* to stress the special considerations that applied in a case where "the party seeking discovery is a high-level *state* official seeking to enforce *state* law") (emphasis added)).

The underlying point is that applying the law enforcement privilege does not normally entail impeding *law enforcement efforts*. That can happen, though, in cases pitting one sovereign against another. In those circumstances, uncertainty about the proper scope and substance of the law enforcement privilege becomes all the more grave. Only this Court can resolve that uncertainty.

* * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully Submitted,

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March 2008